

IN THE ELEVENTH JUDICIAL DISTRICT COURT
OF MONTANA, FOR THE COUNTY OF FLATHEAD

Cause No. DV-80-600

BOARD OF TRUSTEES OF FLATHEAD
COUNTY SCHOOL DISTRICT NO. 5,

-VS-

STATE OF MONTANA DEPARTMENT OF
LABOR AND INDUSTRY, acting
through the BOARD OF PERSONNEL
APPEALS, and the AMERICAN
FEDERATION OF STATE, COUNTY
AND MUNICIPAL EMPLOYEES,
AFL-CIO,

Respondents.

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

The above matter, by stipulation, being presented to the Court on briefs; and the matter being supplemented by oral argument this date; and the Court having duly considered the same and all matters in the file, makes the following:

FINDINGS OF FACT

1. The Board of Trustees of School District No. 5 (District) and Kalispell local of AFSCME, AFL-CIO (Union) signed a negotiated labor agreement attached hereto as Exhibit No. 1.

2. On August 9, 1979, the Union filed a grievance. The grievance proceeded throughout the first three steps, in accordance with the procedures of the Agreement, without resolution.

3. On or about November 9, 1979, the Union requested a list of arbitrators from the Board of Personnel Appeals. That list was issued by the Board of Personnel Appeals on December 10, 1979.

4. The District and the Union agreed to meet on December 14, 1979, for the purpose of striking names from the list furnished by the Board of Personnel Appeals.

5. On the morning of December 14, 1979, representatives of the Union and the District met for the purpose of determining the order of striking names on the list. The results of the coin flip were that the Union would strike names first.

6. On December 14, 1979, the Flathead County Attorney had executed a letter, delivering same by the District to

1 the Union on that same date. Said letter was to the
2 affect that School District No. 5 did not accept and the
3 list of arbitrators was unacceptable to the District in
4 its entirety, and by reason thereof, rejected same.

5 7. The District at that time offered to negotiate
6 the obtaining of another list of arbitrators from a
7 different source. The District, after delivery of the
8 letter, declined to engage in striking names from the
9 list provided by the Board of Personnel Appeals.

10 8. Up to December 14, 1979, the grievance procedures
11 in Exhibit No. 1 were followed by both parties.

12 9. On December 18, 1979, representatives of the
13 District and the Union met briefly. At that meeting the
14 District reaffirmed the action of December 14, 1979 and
15 agreed that other options were available.

16 10. On January 4, 1980, Robert Jensen, the Administra-
17 tor of the Board of Personnel Appeals, transmitted a
18 letter to Mr. Ted O. Lyngus, County Attorney. That letter
19 stated in pertinent part as follows:

20 "Since passage of the Act in 1973, management and
21 union negotiators have often agreed to some form
22 of arbitration for the resolution of grievances
23 and have frequently asked the Board of Personnel
24 Appeals to provide lists of arbitrators when the
25 need arises.

26 Although there is no specific statutory authority
27 for our involvement in this kind of activity, we
28 offer the service in an effort to help parties
29 resolve their differences.

30 I would appreciate your providing me with your
specific objections to each person on the December
10th list as this information would be helpful
when submitting future arbitration lists."

No response as of this date was made to that letter.

11. On January 25, 1980, the Union, without filing
any grievance with the School District concerning its
declining to strike names, filed an unfair labor practice
charge with the Board of Personnel Appeals.

12. The District and the Union did not, between the
dates of December 14, 1979 and March 19, 1980, talk with
one another concerning the obtaining of a new list of
arbitrators.

By reason of the above Findings of Fact, the Court
makes the following:

CONCLUSIONS OF LAW

1. The provisions as to grievance-arbitration process

1 was an integral part of a mandatory condition in the con-
2 tract by reason of the procedure by both parties prior
to utilizing the arbitration provisions of the contract.

3 2. The School District's refusal to participate and
4 strike names was a violation of the agreement.

5 3. Such violation constituted an unfair labor prac-
6 tice by reason of its constituting a breach of the con-
tract in failure to bargain in good faith.

7 By reason of the above, the action of the Board of
Personnel Appeals should be affirmed.

8 Let judgment be rendered accordingly.

9 DATED: May 15, 1981.

10
11 /s/ Robert C. Sykes
12 District Judge
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STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 5-80:

AMERICAN FEDERATION OF STATE,
COUNTY, AND MUNICIPAL
EMPLOYEES, AFL-CIO,

Complainant,

- vs -

FINAL ORDER

MR. PAUL TUTVEDT, MR. KEN
SIDERIUS, AND MR. KEITH
ALLEED, KALISPELL SCHOOL
DISTRICT #5,

Defendants.

* * * * *

The Findings of Fact, Conclusions of Law and Recommended
Order were issued by Hearing Examiner Kathryn Walker, on
July 7, 1980.

Exceptions to the Findings of Fact, Conclusions of Law and
Recommended Order were filed by Jonathan B. Smith of the Office
of Flathead County Attorney, Kalispell, Montana, on behalf of
the Defendant, on July 22, 1980.

After reviewing the record and considering the briefs and
oral arguments, the Board orders as follows:

1. IT IS ORDERED, that the Exceptions of Defendant to the
Findings of Fact, Conclusions of Law and Recommended Order are
hereby denied.

2. IT IS ORDERED, that this Board therefore adopts the
Findings of Fact, Conclusions of Law and Recommended Order of
Hearing Examiner Kathryn Walker as the Final Order of this Board.

DATED this 30th day of September, 1980.

BOARD OF PERSONNEL APPEALS

Brent Cronley
Brent Cronley
Chairman

cc: Jonathan B. Smith
George F. Hagerman

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE #5-60:

AMERICAN FEDERATION OF STATE,
COUNTY, AND MUNICIPAL
EMPLOYEES, AFL-CIO,

Complainant,

vs.

MR. PAUL TUTVEDT, MR. KEN
SIDERIUS, AND MR. KEITH
ALLRED, KALISPELL SCHOOL
DISTRICT #5,

Defendants.

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDED ORDER.

The above-captioned unfair labor practice charges were filed with this Board on January 25, 1980. On February 29, 1980, this Board accepted Complainant's amendments to those charges. The charges allege that the Defendants violated section 39-31-401(5) MCA by failing to comply with the Agreement entered into between the Board of Trustees of School District #5, Kalispell, Montana and Local #2795 of the American Federation of State, County, and Municipal Employees, AFL-CIO (specifically, that the School District refused to strike names for selection of an arbitrator in accordance with the Adjustment of Grievance procedure outlined by Article 11.4.6(4) of the Agreement and violated the grievance procedure time limits provision contained in Article 11.4.3 of the Agreement which requires settlement of the grievance in behalf of the grievant should such a violation occur).

On February 8, 1980, this Board received the Defendants' Motion to Dismiss and Brief in Support and Answer. The Motion to Dismiss was denied on February 29, 1980. The Defendants' Answer, which encompassed the scope of the Amended Complaint and was deemed the Defendants' Answer in the matter, admitted that the December 14, 1979, letter

1 referred to in the Complaint was sent and that the Defendants
2 did not participate in the striking of names from the original
3 list provided by the Board of Personnel Appeals but denied
4 that those actions constituted an unfair labor practice.

5 The matter was set for hearing on March 28, 1980. On
6 that date the American Federation of State, County, and
7 Municipal Employees, AFL-CIO (herein referred to as the
8 Union), represented by George Hagerman, Field Representative
9 for AFSCME Montana Council #9, and Kalispell School District
10 #5 (herein referred to as the District), represented by
11 Jonathon B. Smith, Flathead Deputy County Attorney, met with
12 the hearing examiner, Kathryn Walker, and agreed (1) to
13 waive the administrative hearing in the matter, (2) to
14 present a stipulation of the fact situation to the hearing
15 examiner, and (3) to brief the issues to be considered by
16 the hearing examiner.

17 The parties' briefs were duly received by this Board
18 and the matter was deemed submitted on April 14, 1980.

19 FINDINGS OF FACT

20 The following facts were stipulated to by the parties
21 and are the facts upon which the hearing examiner will base
22 her decision in this matter.

23 1. The Board of Trustees of School District #5 (Dis-
24 trict) and the Kalispell local of AFSCME, AFL-CIO (Union)
25 signed a negotiated labor agreement attached hereto as
26 Exhibit #1.

27 2. On August 9, 1979, the Union filed a grievance.
28 The grievance proceeded throughout the first three steps, in
29 accordance with the procedures of the Agreement, without
30 resolution.

31 3. On or about November 9, 1979, the Union requested
32 a list of arbitrators from the Board of Personnel Appeals.

1 That list was issued by the Board of Personnel Appeals on
2 December 10, 1979.

3 4. The District and the Union agreed to meet on
4 December 14, 1979, for the purpose of striking names from
5 the list furnished by the Board of Personnel Appeals.

6 5. On the morning of December 14, 1979, representa-
7 tives of the Union and the District met for the purpose of
8 determining the order of striking names on the list. The
9 results of the coin flip were that the Union would strike
10 names first.

11 6. On December 14, 1979, Flathead County Attorney,
12 Ted Lympus, executed a letter. That letter is Exhibit #2.
13 Exhibit #2 was delivered by the District to the Union on
14 December 14, 1979. At that time the District declined to
15 engage in striking names from the list provided by the Board
16 of Personnel Appeals.

17 7. Up to December 14, 1979, the grievance procedures
18 in Exhibit #1 were followed by both parties.

19 8. On December 18, 1979, representatives of the
20 District and the Union met briefly. At that meeting the
21 District reaffirmed the action of December 14, 1979, and
22 agreed that other options were available.

23 9. On January 4, 1980, Robert Jensen, the Adminis-
24 trator of the Board of Personnel Appeals, transmitted a
25 letter to Mr. Ted O. Lympus, County Attorney. That letter
26 is attached as Exhibit #3. Mr. Lympus has not responded to
27 that letter as of this date.

28 10. On January 25, 1980, the Union, without filing any
29 grievance with the District concerning its declining to
30 strike names, filed an unfair labor practice charge with the
31 Board of Personnel Appeals.

32 11. The District and the Union did not, between the

1 dates of December 14, 1979, and March 19, 1980; talk with
2 one another concerning the obtaining of a new list of arbit-
3 rators.

4 DISCUSSION

5 Before considering the substantive issues relevant to
6 this unfair labor practice charge, the hearing examiner will
7 briefly address the District's contention that:

8 The dispute between the parties is no more than a
9 dispute over the interpretation of the contract signed
10 by the parties which should, under the terms of that
11 Agreement, be dealt with according to the procedures
12 contained in the Agreement. [Brief of Defendants]

13 This Board has previously considered the relationship
14 of an unfair labor practice charge to a contract's grievance/
15 arbitration machinery. It is familiar with and has applied
16 the principles of prearbitral deferral as set forth in the
17 National Labor Relations Board's Collyer doctrine, derived
18 from its landmark Collyer Insulated Wire¹ decision which
19 enunciated its policy to refrain from exercising jurisdic-
20 tion in respect to disputed conduct which is arguably both
21 an unfair labor practice and a contract violation when
22 certain criteria are met. In fact, in ULP #13-78, American
23 Federation of State, County, and Municipal Employees, AFL-CIO
24 vs. City of Laurel this Board determined that the policies
25 and provisions of the Act would best be effectuated if that
26 complaint were remanded to the grievance/arbitration proce-
27 dure specified by the parties' collective bargaining agree-
28 ment.

29 However, regardless of the usefulness and broad applica-
30 tion of prearbitral deferral, neither this Board nor the
31 National Labor Relations Board will "automatically" defer,
32 even when a complaint is related to a contract provision and

¹ Collyer Insulated Wire, 192 NLRB 837, 77 LRM 1931 (1971).

1 the contract contains a grievance procedure that could
2 arguably address the problem. Rather, both bodies consider
3 and weigh certain factors and use their discretion on a
4 case-by-case basis when determining the advisability of
5 deferral of a complaint to arbitration.

6 Several National Labor Relations Board decisions illus-
7 trate that an employer's interference with the use of a
8 contract's grievance/arbitration procedure constitutes
9 grounds for denial of prearbitral deferral.² Based on this
10 reasoning, this hearing examiner thinks it inappropriate to
11 defer the matter now before her to the parties' contractu-
12 ally agreed upon grievance procedure, for the complaint
13 alleges that the District did interfere with the operation
14 of the contract's grievance procedure by refusing to strike
15 names on an arbitration list. Basically, this hearing
16 examiner thinks it illogical and potentially unproductive to
17 defer this complaint to the same process from which it
18 originated.

19 It is not disputed that on December 14, 1979, the
20 District refused to strike names for the selection of an
21 arbitrator from a list received from the Board of Personnel
22 Appeals in accordance with the District's and the Union's
23 collective bargaining agreement. The District argues that
24 this refusal was permitted by the contract language:

25 In this case, the District and the Union disagree over
26 the application of the terms of their contract. The
27 District believes that that contract allows the parties
28 to decline to strike names from a list of arbitrators
if they consider that list unacceptable in its entirety.
The Union, on the other hand, argues that the contract

29 ²For discussion of this point and case citations see American Bar
30 Association, The Developing Labor Law: Cumulative Supplement 1971-1975
31 (Washington, D.C.: Bureau of National Affairs, Inc., 1976), p. 376;
32 1976 Supplement (Washington, D.C.: Bureau of National Affairs, Inc.,
1977), p. 136; 1977 Supplement (Washington, D.C.: Bureau of National
Affairs, Inc., 1978), p. 162; and 1978 Supplement (Washington, D.C.:
Bureau of National Affairs, Inc., 1979), p. 136.

requires the parties to strike names from any list provided by this board [the Board of Personnel Appeals] . . . [Emphasis added] [Defendant's Reply Brief]

The contract, which contains a rather standard grievance procedure³, specifies that an arbitrator be selected in the following manner:

Should the Union consider the reply of the Board of Trustees to be unsatisfactory, the Union shall, within five (5) working days of the receipt of the reply, notify in writing the Board of Trustees of its intention to refer the grievance to arbitration. Thereupon, within ten (10) working days after such notice is delivered to the Chairman of the Board of Trustees, the Chairman and or the Union may request the Board of Personnel Appeals, Department of Labor and Industry, State of Montana, to provide both parties with an identical list of names and addresses of five (5) persons who have indicated a desire to provide services as arbitrators. The Union and the Chairman of the Board of Trustees shall, within three (3) working days' receipt of such lists, meet and by alternately striking names from the list select the arbitrator by requesting the services of the last name remaining on the list. [Emphasis added] [Exhibit #1, Labor Agreement between District and Union, 1:4.6]

This language is plain and unambiguous. It clearly does not support the District's argument that the "contract allows the parties to decline to strike names from a list of arbitrators if they consider that list unacceptable in its entirety." (Defendant's Reply Brief)

Another factor relevant here is that there is no indication on the record that the District ever attempted to explain its reasons for finding the list of arbitrators so objectionable. The December 14, 1979, letter from Ted O. Lympus, County Attorney and agent for the District in this matter, to the Union and the Board of Personnel Appeals merely states that ". . . the list of proposed arbitrators

³The contract defines a "grievance" as "an allegation by an employee resulting in a dispute or disagreement between the employee and the School District as to the interpretation or application of terms and conditions of this Agreement." It provides for a four step grievance procedure: step 1, response of immediate supervisor; step 2, response of Superintendent or his designee; step 3, response of Board of Trustees; step 4, final and binding arbitration.

2 District does, therefore, hereby reject same." (Exhibit #2)
3 Furthermore, finding of fact #9 establishes that Mr. Lyapus
4 never responded to a letter from Robert R. Jensen, Adminis-
5 trator of the Board of Personnel Appeals, asking for "spe-
6 cific objections to each person on the December 10th list . . ."
7 (Exhibit #3) No substantive reasons for its rejection of
8 the list of arbitrators having been offered, it is impos-
9 sible for this hearing examiner to find that the District's
10 refusal to strike names in accordance with the contract is
11 in any way mitigated by the fact that the list was somehow
12 unfair, inappropriate, or biased.

13 From the foregoing, the hearing examiner concludes that
14 the District was in breach of contract when it refused to
15 strike names from the arbitration list. She now must deter-
16 mine if this breach of contract constituted the unfair labor
17 practice of refusing to bargain in good faith in violation
18 of section 39-31-401(5) MCA.

19 As pointed out in Defendant's Briefs, a contract viola-
20 tion is not a per se unfair labor practice. However, the
21 facts of this matter show that the District's refusal to
22 strike names on the arbitration list resulted in the parties'
23 failure to select an arbitrator and rendered ineffective
24 their contractually agreed upon dispute resolving mechanism.
25 This board has consistently ruled that such action consti-
26 tutes a failure to participate in the ongoing process of
27 collective bargaining and therefore the unfair labor prac-
28 tice of refusing to bargain in good faith.

29 The Board's decision in the matter of ULP #1-75, Inter-
30 national Brotherhood of Painters and Allied Trades, Local
31 #1021 vs. Montana State University and Barry Hjort pointed

1 out that "collective bargaining is a continuing process"⁴
2 that "does not cease with the completion of negotiations on
3 a working agreement between labor and management." The
4 decision stated "[i]f a provision of a standing contract is
5 disputed by either the employer or the Union, the 'contractual
6 mechanism'⁵ for the continuing process of collective
7 bargaining is the all important, agreed to grievance procedure"
8 and asked "did the employer, by refusing to take part
9 in the 'contractual mechanism' for the ongoing process of
10 collective bargaining, refuse to bargain in good faith?"
11 The hearing examiner determined that the answer to that
12 question was in the affirmative and concluded:

13 By refusing, and continuing to refuse, to bargain
14 collectively with the Union through the use of the
15 standing contractual grievance procedure, the Employer
16 did engage and in engaging in an unfair labor practice
within the meaning of Section 59-1605 (E) of the Revised
Codes of Montana, 1947 [now section 39-31-405(5) MCA].

17 In ULP #3-76, Local #521 of the International Association
18 of Fire Fighters vs. City of Billings the Board pointed
19 out that what is now section 39-31-181 MCA of Montana's
20 Collective Bargaining Act for Public Employees provides:

21 In order to promote public business by removing certain
22 recognized sources of strife and unrest, it is the
23 policy of the state of Montana to encourage the practice
24 and procedure of collective bargaining to arrive at
25 friendly adjustment of all disputes between public
26 employers and their employees.

27 and that what is now section 39-31-306(2) MCA states:

28 An agreement may contain a grievance procedure culminating
29 in final and binding arbitration of unresolved
30 grievances and disputed interpretations of agreements.

31 Following the guidance of these statutory provisions,
32 the hearing examiner went on to say:

33 ⁴Citing Conley vs. Gibson 355 U.S. 41, 46, 41 LRM 2089 (1957) Accord
34 NLRB vs. Acme Industrial Co., 385 U.S. 432, 64 LRM 2069 (1967).

35 ⁵Citing Tishin Baller Bearing Co. vs. NLRB, 161 F.2d 949, 20 LRM
36 2204 (Ca 6, 1947) Accord NLRB vs. Knight Moberly Corp., 251 F.2d 753, 41
37 LRM 2262 (Ca 6, 1957).

1 A grievance procedure which culminates in final
2 and binding arbitration is one mechanism in collective
3 bargaining which allows employers and employees to
4 arrive at friendly adjustment of all disputes. This is
5 in agreement with the policy established by the legis-
6 lature, and it is essential that this Board encourage
7 the enforcement of those contractual provisions where-
8 ever possible.

9
10 To reiterate, this Board must encourage and support
11 Agreements which provide the necessary mechanism to
12 reach friendly adjustments of disputes. The grievance
13 procedure providing for binding arbitration does just
14 that in this fact situation. . . . [T]he only conclusion
15 that I can reach is that the City incorrectly refused
16 to proceed with the arbitration in question as requested
17 by the Union.

18 The hearing examiner concluded that the City had failed
19 to bargain in good faith and was therefore guilty of an
20 unfair labor practice. He ordered the City to proceed with
21 the arbitration as called for in the agreement between the
22 City and the Union.

23 This hearing examiner finds the above-cited Board
24 precedent applicable in principle to the matter now under
25 consideration. Accordingly, she finds that the District did
26 violate section 39-31-401(5) MCA when it refused to strike
27 names on the arbitration list.

28 Having disposed of the primary issue before her, the
29 hearing examiner will not proceed to consider the other
30 points raised in the complaint. The Union's request that
31 the hearing examiner resolve the grievance giving rise to
32 this complaint in favor of the grievant because the speci-
33 fied time limits have been violated is a matter more appro-
34 priately addressed by the arbitrator deciding the merits of
35 the grievance itself. Because she lacks the authority to
36 assess punitive damages, this hearing examiner cannot con-
37 sider the Union's request that she direct the District to
38 pay the costs it has incurred in this matter.

39 CONCLUSION OF LAW

40 By refusing to strike names for the selection of an
41 arbitrator in accordance with Article 11.4.6(4) of the

the District has violated section 19-31-401(5) MCA.

RECOMMENDED ORDER

Within five days of the time this Recommended Order becomes the Final Order of the Board, agents of the District and the Union shall meet to select an arbitrator from the list provided by the Board of Personnel Appeals on December 10, 1979. In accordance with the coin flip of December 14, 1979, the Union shall strike the first name. The parties shall then participate in the arbitration process as specified in their collective bargaining agreement.

NOTICE

Exceptions may be filed to these Findings of Fact, Conclusions of Law, and Recommended Order within twenty days service thereof. If no exceptions are filed with the Board of Personnel Appeals within that period of time, the Recommended Order shall become the Final Order. Exceptions shall be addressed to the Board of Personnel Appeals, Capitol Station, Helena, Montana 59601.

DATED this 17th day of July, 1980.

BOARD OF PERSONNEL APPEALS

By Kathryn Walker
Kathryn Walker
Hearing Examiner

CERTIFICATE OF MAILING

I, James Jacobson, do hereby certify and state that I did on the 8 day of July, 1980 mail a true and correct copy of the above Findings of Fact, Conclusions of Law, and Recommended Order to the following:

Mr. Paul Tutvedt, Chairman
Kalispell School Board
Kalispell School District #5
233 1st Avenue East
Kalispell, MT 59901